91-807

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT McNATT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David F. Tamer, Esquire
Counsel for Petitioner
1336 Westgate Center Dr.
Winston-Salem, NC 27103
(919) 760-1273

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

QUESTIONS PRESENTED

I. Did the District Court err in denying the Petitioner's Motion to Suppress the introduction of cocaine allegedly found in his truck?

II. Did the District Court err in denying the motion of the Petitioner for dismissal with charges on the ground that his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution was denied by reason of a conflict of interest on the part of his retained counsel?

III. Did the District Court err in refusing to allow the Petitioner's witness, Assistant District Attorney Elaine Pappas, to state to the jury her opinion regarding the reputation for truthfulness of the Government's witness, Ed Clarke?

IV. Did the District Court err in

refusing to allow the introduction of a letter allegedly written by the Government's witness, Ed Clarke, wherein he admitted that he had fabricated evidence in another narcotics prosecution?

V. Did the District Court err in denying the Petitioner's Motion In Limine to restrict the argument of the Government concerning his refusal to consent to the search of his vehicle?

PARTIES TO THE PROCEEDING

Robert McNatt, Petitioner,

United States of America, Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

OTHER AUTHORITIES:

ASSIGNMENTS OF ERROR

I. The District Court erred in denying the Petitioner's Motion to Suppress the introduction of cocaine allegedly found in his truck.

II. The District Court erred in denying the Motion of the Petitioner for dismissal of the charges on the ground that his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution was denied by reason of a conflict of interest on the part of his retained counsel.

III. The District Court erred in refusing to allow the Petitioner's witness, Assistant District Attorney Elaine Pappas, to state to the jury her opinion regarding the reputation for truthfulness of the Government's witness, Ed Clarke.

IV. The District Court erred in refusing to allow the introduction of a letter allegedly written by the Government's witness, Ed Clarke, wherein he admitted that he had fabricated evidence in another narcotics prosecution.

V. The District Court erred in denying the Petitioner's Motion In Limine to restrict the argument of the Government concerning his refusal to consent to the search of his vehicle.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

I. Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no WARRANTS shall be issued, but upon probable cause, supported by OATH or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed to the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On August 16, 1989, Petitioner Robert McNatt was arrested, pursuant to a warrant for arrest issued in the United States District Court for the Eastern District of North Carolina. (App 7) The Defendant had been charged in a sealed indictment with possession with intent to distribute approximately one (1) kilogram of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). (App 8) According to a superseding indictment, returned on October 24, 1989, by the United States Grand Jury for the Eastern District of North Carolina, the Defendant allegedly committed the offense on or about September 9, 1988. (App 9)

On November 6, 1989, the Defendant was arraigned before the Honorable W. Earl Britt, Chief United States District Judge for the

Eastern District of North Carolina, sitting in Wilmington. (App 4) The Defendant entered a plea of not guilty to the offense charged in the indictment.

Trial began on November 8, 1989 before Judge Britt, sitting in Wilmington. (App 4) On November 14, 1989, the jury, empaneled to try the case, returned a verdict finding the Defendant guilty as charged. (App 5, 444)

On January 29, 1990, Defendant moved for dismissal of the charges on the ground that his Sixth Amendment right to the effective assistance of counsel was denied by reason of a conflict of interest on the part of the counsel he initially retained in the case. (App 5, 363)

The cause came on for hearing before Judge Britt, sitting in Wilmington, on February 12, 1990. After hearing evidence and the arguments of counsel, the motion was

denied. (App 484-487) The Court thereupon conducted a sentencing hearing, at which time the defendant was sentenced to a term of 160 months imprisonment. (App 503-509)

On April 25, 1991, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. United States vs. McNatt, ____ F.2d _____ (4th Cir. 1991).

STATEMENT OF THE FACTS

On or about August 26, 1988, a number of North Carolina law enforcement officers executed a search warrant at a farm owned by the Petitioner. There was an extensive hog raising operation at the farm, and during the search, the officers found 80 grams of marijuana, as well as several loaded firearms. The marijuana was found in a barrel near a shed which was removed from the Petitioner's residence and in the vicinity of other barns and out buildings. A state warrant for the arrest of the Petitioner was not issued at that time, but it was issued on September 9, 1988, charging him with possession of marijuana and possession of a weapon by a convicted felon.

On September 9, 1988, a Government informant contacted Special Agent Chris C.

Jackson of the Drug Enforcement Administration in Wilmington, North Carolina. The informant told the agent that Petitioner was going to purchase a kilogram of cocaine from James McGrady, Sr. in Fayetteville, North Carolina on that day and that the cocaine was to be delivered by Federal Express. Agent Jackson requested the informant to contact North Carolina SBI Agent Lea in Fayetteville and give him this information. Upon receiving this information, Agent Lea sent Agents Edwin Clarke and David Jenkins to McGrady Enterprises, a business owned by James McGrady. The agents were advised to watch for the Federal Express truck and for a blue Chevrolet pickup truck owned by McNatt. The agents saw a Federal Express truck near McGrady Enterprises. They stopped the truck, and they were advised that a delivery had been made to the premises. As they approached

McGrady Enterprises, they saw a blue pickup truck leaving the parking lot, and they followed it.

After several blocks, they stopped the truck, and they found the Petitioner to be the driver. Agent Clarke asked the Petitioner to get out of the truck, and at this point Agent Ridgen arrived.

The agents asked the Petitioner for permission to search the vehicle, but he denied the request upon learning that they did not have a search warrant. The officers confirmed that there was an outstanding arrest warrant for the Petitioner on the marijuana charges arising out of the search of his farm. Petitioner was searched at the scene, and $9,000.00 was found on his person. The truck was not searched at that time, but it was towed to the impoundment lot where it was searched, and a kilogram of cocaine allegedly

was found in the front seat under a sweater. The Defendant was arrested on state charges of possession with intent to distribute cocaine. However, this charge was dismissed by state prosecutors. However, in August, 1989, Petitioner was arrested by DEA Agent Jackson on Federal charges arising out of the same facts and upon which he stood trial.

ARGUMENT

I. The District Court erred in denying the Petitioner's Motion to Suppress the introduction of cocaine allegedly found in his truck.

At trial, the Petitioner made an oral motion to suppress the kilogram of cocaine allegedly taken from his truck. It was the Petitioner's position that the inventory search of the vehicle was not the result of a valid arrest and was therefore illegal, because he was stopped and arrested before an arrest warrant had been issued.

The District Court judge conducted a voir dire hearing during the trial, and he concluded that even if the warrant for Petitioner's arrest had not been issued prior to the stop, there was probable cause to stop him due to the information supplied by the confidential informant. On appeal, the Fourth Circuit upheld the ruling of the District

Court.

The scope of the protection provided by the Fourth Amendment remained largely unexplored until 1886 when, in Boyd vs. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the Supreme Court held that forced disclosure of papers amounting to evidence of crime violated the Amendment and that such items were inadmissible in a criminal proceeding. The doctrine was further expanded by Weeks vs. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed.652 (1914), wherein the Court held that to admit evidence illegally seized by federal officers would, in effect, put a stamp of approval on their unconstitutional conduct. The exclusionary rule came to its full fruition in Mapp vs. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), wherein the Court held that all evidence obtained by searches and seizures in

violation of the United States Constitution were inadmissible.

The deterrence of unreasonable searches and seizures is the major purpose behind the exclusionary rule. Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Linkletter vs. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). However, the exclusionary rule does not bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by detached and neutral magistrate but ultimately found to be unsupported by probable cause. United States vs. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

In the present case, at the time of the stop, there was not a valid arrest warrant issued; nor was there information from an informant who had been described as reliable

to the officers prior to their undertaking to seize the petitioner. Instead, it is manifest that the operation was undertaken by rogue elements of law enforcement agencies operating essentially on their own.

Agent Clarke testified that he had stopped Petitioner after his supervisor directed him to employ his own discretion. However, he filed a report stating that he had observed the petitioner driving his pickup truck on Marchison Road and that he knew an outstanding warrant was then pending upon him. As a result, he undertook to stop the Petitioner's vehicle. (App) However, Agent Clarke filed yet another report stating that the search had been conducted incident to an arrest and that the vehicle had been impounded because it was blocking the flow of traffic. (App 442) At no time did the Government demonstrate that a valid arrest

warrant had been obtained prior to the Petitioner being stopped.[1]

An arrest or search is unreasonable if it is not based upon probable cause. Wong Su vs. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Resort to the warrant process is preferable because it "interposes an orderly procedure" under which a neutral and detached magistrate can make informed and deliberate determinations regarding the issue of probable cause. Aguilar vs. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In making a determination of probable cause, it is essential that it be concluded that more probably than not there is a basis for singling out but one person. E.g. Mallory

[1]It must not be forgotten, in this context, that Assistant District Attorney Elaine Pappas was not allowed to testify concerning her investigation of Agent Clark which would have tended to show the inappropriate and illegal conduct engaged in by such agent prior to petitioner's arrest.

vs. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). The task of determining the question of probable cause is simply to make a practical decision, that there is a fair probability that contraband or evidence of a crime will be found in a particular place. Gates vs. Illinois, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In the present case, the stopping of the petitioner's truck amounted to an act of subterfuge which was utilized as a pretext for conducting an inventory search upon the vehicle after it had been seized. For that reason, the motion to suppress ought to have been granted, and the Court of Appeals erred in affirming the action of the District Court.

II. The District Court erred in denying the Motion of the Petitioner for dismissal of the charges on the ground that his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution was denied by reason of a

conflict of interest on the part of his retained counsel.

It is fundamental that the constitutional right to effective assistance of counsel entitles a defendant to the complete and undivided loyalty of his counsel. See generally W. LaFave & J. Israel, Criminal Procedure Section 11.9 (1985). A defendant does not receive the full protection embodied in the adversary process when decisions made by his chosen attorney are influenced by obligations owed to persons other than the defendant. Wood vs. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

The Sixth Amendment to the United States Constitution provides clearly and unequivocally that the accused in a criminal prosecution is entitled to have the effective assistance of counsel for his defense. Gideon vs. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963). It is manifest that the Sixth Amendment right to the effective assistance of counsel includes the right to the conflict-free assistance of counsel. Glasser vs. United States, 315 U.S. 50, 52 S.Ct. 457, 86 L.Ed.2d 680 (1942). In Glasser, the Supreme Court of the United States held that a defendant was denied his Sixth Amendment right to the effective assistance of counsel when the trial court placed his retained attorney in a conflict of interest situation by appointing that attorney to also represent a co-defendant. Speaking for the Court, Mr. Associate Justice Murphy observed:

> Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> To determine the precise degree of prejudice sustained by Glasser as a

> result of the Court's appointment of Stuart as counsel for (co-defendant) is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to our Courts to indulge in nice calculations as the amount of prejudice arising from its denial.

315 U.S. at ____, 52 S.Ct. at ____, 86 L.Ed.2d at _____.

While a defendant may waive his right to conflict-free representation, Holloway vs. Arkansas, supra, that waiver must be knowing and voluntary. Brady vs. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

On September 9, 1988, the Petitioner was arrested by Detective Ed Clarke of the Cumberland County Bureau of Narcotics. (App 165) At that time, he was charged with felonious possession of marijuana, possession of a firearm by a felon, and trafficking in cocaine. (App. 353) Shortly thereafter, the Petitioner retained Mr. Ronnie M. Mitchell, of

the Cumberland County Bar, to represent him. (App 364)

Toward the end of September 1988, Mr. Mitchell was retained by James William McGrady, Sr. and James William McGrady, Jr., to represent them in their cocaine trafficking cases which were then pending in the United States District Court for the Eastern District of North Carolina. (Id.) Thereafter, on December 29, 1988, Mr. Mitchell and both Defendants McGrady were interviewed by Federal and State law enforcement officers, in the presence of Mr. Mitchell on January 19, 1989 and January 24, 1989. (Id.) During these interviews, Defendants McGrady made statements which implicated Defendant McNatt with regard to the case at bar. At the time these interviews were conducted, Mr. Mitchell was still representing Petitioner with regard to the present case.

On April 11, 1989, Defendants McGrady appeared before the Honorable Malcolm J. Howard, United States District Judge for the Eastern District of North Carolina for the purpose of sentencing. (App 365) At that time, pursuant to the terms of a plea agreement, the Government made a request for a downward departure from the Federal Sentencing Guidelines on the basis of substantial assistance made by Defendants McGrady. (Id.) At that time, Mr. Mitchell still represented Petitioner.

On May 1, 1989, the charges pending in Cumberland County Superior Court against Petitioner were dismissed by the State of North Carolina. According to the affidavit of Ms. Elaine S. Pappas, Assistant District Attorney for Cumberland County, North Carolina, she made the Office of the United States Attorney for the Eastern District of

North Carolina aware of the joint representation by Mr. Mitchell of Defendants McGrady and Petitioner. (App 437) On July 13, 1989, the marijuana charge pending against the defendant in Cumberland County was resolved by virtue of a negotiated plea. (App 365-366) At that time, Petitioner was still being represented by Mr. Mitchell.

In preparation for the defense of the charge brought against him in Federal Court, Petitioner fully discussed his case with Mr. Mitchell, who was then representing the Government's principal witnesses against him. While Petitioner obtained new counsel for the trial of this matter, the specter of prejudice is clear in that Defendants McGrady testified extensively on behalf of the Government.

The record establishes that during the month of December 1988, Mr. Mitchell was actively engaged in seeking to negotiate a

plea agreement with the Government. After the interviews of Defendants McGrady by law enforcement officers in January, 1989. Mr. Mitchell knew or should have known that the original reports filed by Detective Edwin Clarke in the present case were false. It is apparent that the use of this knowledge might have adversely affected what Mr. Mitchell was doing on behalf of Defendants McGrady. There is no indication that this information was utilized to advance the interests of Petitioner. In fact, the interest of Petitioner was manifestly compromised in that there was no effort on the part of Mr. Mitchell to resolve the cocaine case in the Superior Court of Cumberland County. Furthermore, there was no effort to capitalize on the State's unwillingness to prosecute a charge brought by Detective Clarke, who had lost credibility with the Office of the

Cumberland County District Attorney.

In the present case, the Petitioner never waived his right to conflict-free assistance of counsel. It is clear that the activity undertaken by the Petitioner's retained counsel on behalf of Defendants McGrady compromised the ability of Petitioner to mount an affective defense. Prior to being relieved of responsibility, Mr. Mitchell actively engaged in negotiating a plea agreement on behalf of Defendants McGrady, under the term of which they were to provide assistance to the Government. Such activity necessarily compromised the right of Petitioner to the undivided loyalty of his counsel. It follows, therefore, that the District Court erred in denying his motion for dismissal.

III. The District Court erred in refusing to allow the Petitioner's witness, Assistant District Attorney Elaine Pappas, to state to the jury her opinion regarding the

reputation for truthfulness of the Government's witness, Ed Clarke.

During a voir dire hearing which was conducted in connection with the testimony of Assistant District Attorney Elaine S. Pappas, the District Court ruled that the credibility of Agent Clarke could be attacked in the form of opinion testimony concerning the character of the witness for truthfulness. (App 253) On direct examination, Witness Pappas stated that it was her opinion of Agent Clarke that he was not truthful. (App 260) On cross examination, the Assistant United States Attorney asked Witness Pappas whether her current opinion regarding Agent Clarke was different from what it had been when she had worked with him in Cumberland County District Court. According to Witness Pappas, at the time she worked in Cumberland County District Court, it had been her opinion that Agent

Clarke was truthful. (App 262) On re-direct examination, the Trial Judge refused to allow Witness Pappas to explain to the jury what had changed her mind. (App 263)

During its cross-examination of Witness Pappas, the Government made inquiry concerning matters which had not been discussed during direct examination. In particular, the Government opened the door with regard to the issue of whether or not Witness Pappas had changed her opinion concerning Agent Clarke's credibility.

It is proper to address questions on redirect examination to issues which have relevance to the case and which arise out of questions propounded on cross-examination. E.g. United States vs. Trenton Potteries Co., 273 U.S. 392, 71 L.Ed.2d 700, 47 S.Ct. 377 ( ). See generally 6 Wigmore, Evidence Sections 1896-1897. In particular, it has

been observed that the practice is uniform that a party's examination may extend to answering any new matter drawn out in the previous examination of the adversary. See generally McCormick on Evidence Section 32 (2d Ed. 1972). In other words, the reply to new matter drawn out on cross-examination is the normal function of re-direct examination, and such inquiry for this purpose is a matter of substantial right. E.g. Villeneuve vs. Manchester St. R. Co., 73 N.H. 250, 60 A. 748 (1905). To hold otherwise, would be to adopt a rule which is inconsistent with the Federal practice regarding the scope of cross-examination. It must be kept in mind that cross-examination, in Federal practice is limited to facts and circumstances connected with matters stated in direct examination. Philadelphia & T.R. Co. vs. Stimpson, 14 Pet. (39 U.S.) 448, 10 L.Ed.2d 535 (1840); see

generally 2 C. Wright, Federal Practice and Procedure Section 416 (2nd Ed. 1982). It necessarily follows, therefore, that the District Court erred in not allowing the Petitioner to explore fully the issue of Agent Clarke's credibility on re-direct examination in light of the fact that the Government opened the door in this regard.

IV. The District Court erred in refusing to allow the introduction of a letter allegedly written by the Government's witness, Ed Clarke, wherein he admitted that he had fabricated evidence in another narcotics prosecution.

During the course of her testimony, Witness Pappas testified that she had received a document purporting to have been written by Agent Clarke on March 3, 1989, wherein he admitted to fabricating evidence in several other narcotics prosecutions. According to Witness Pappas, the SBI had analyzed the document and had reached the conclusion that

it had been written by Agent Clarke. (App 246) While the District Court allowed the Petitioner to establish the record with regard to this document, it refused to allow the introduction of the statement.

It is manifest that this document goes to the heart of Agent Clarke's credibility with regard to the prosecution against the Petitioner. It tends to show bias for interest on the part of the agent. To the extent that specific instances of misconduct other than convictions pertains to questions of bias or interest, such evidence is neither immaterial nor collateral. Fed. R. Evid. 608(b). As the record makes clear, had it not been for the efforts and testimony of Agent Clarke, the Government would have had little evidence upon which to base its prosecution.

Viewed in this light, it is respectfully contended by the Petitioner that the District

Court was in error in excluding the document from the jury's consideration.

V. The District Court erred in denying the Petitioner's Motion In Limine to restrict the argument of the Government concerning his refusal to consent to the search of his vehicle.

According to Agent Clarke, he asked the Petitioner if "he would mind us searching his vehicle". (App 163) The Petitioner then asked if the officer had a search warrant. Upon being told that they did not have a search warrant, the Petitioner declined to give consent to the requested search. After the Petitioner was taken into custody, the vehicle was towed to an impound lot where an inventory search was conducted. (App 166-167) At that time, a package containing approximately one kilogram of cocaine allegedly was recovered. (App 167-171)

Prior to the arguments of counsel, the

Petitioner made a motion in limine to prevent the Assistant United States Attorney from arguing that the exercise of the defendant's Fourth Amendment rights was a basis upon which guilty knowledge could be inferred. (App 311) The District Court denied the motion. (App 311-312)

During her closing argument, the Assistant United States Attorney contended:

> If (Clarke) was going to set up Mr. McNatt, he certainly could have set him up for a gram or an ounce as easily as a kilogram. But, if he did, then John Ridgen came up and said, Mr. McNatt can I search your truck, why would have has said, sure, go ahead, there is nothing in it. What did he say? No. Why? He knew it was there sitting in the front seat of the car where he wrapped it up in a brown sweater just like he told Jr.

(App 343)

It is the position of the Petitioner that such argument on the part of the Government was improper and prejudicial.

It is a violation of a defendant's Due Process of Law for the Government to argue that the assertion of a constitutional guaranty supports an inference of guilt. Doyle vs. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); United States vs. Lorick, 753 F.2d 1295 (4th Cir.), cert. denied, 471 U.S. 1107 (1985); United States vs. Vera, 701 F.2d 1349 (11th Cir. 1983); United States vs. Maverick, 601 F.2d 1921 (7th Cir. 1979); United States vs. Taxe, 540 F.2d 961 (9th Cir. 1976); United States vs. Maizumi, 526 F.2d 848 (5th Cir. 1976); compare United States vs. Wooten, 688 F.2d 941 (4th Cir. 1982); United States vs. Carroll, 678 F.2d 1208 (4th Cir. 1982).

In United States vs. Taxe, defendants were convicted of conspiracy and willful infringements of copyrights for profit. In

addition, Defendant Richard Taxe was convicted of mail fraud. During his closing argument, the Assistant United States Attorney argued that the two defendants did not consent to a search of their vehicles by federal agents. The Ninth Circuit Court of Appeals squarely held that the prosecutor's comments concerning the defendant's refusal to consent to a search of their vehicles was misconduct. United States vs. Taxe, 540 F.2d at 969. However, in light of a subsequent curative instruction, the Court ruled that the error was harmless.

The test for determining whether a prosecutor's comments warrant the granting of a new trial is (1) whether the remarks were improper, and (2) whether they prejudicially affected substantive rights of the defendant. E.g. United States vs. Vera, supra, compare United States vs. Lorick, supra.

The decision of the Court of Appeals

upholding the action of the District Court is untenable. The fact that the comment of the prosecutor dealt with the Petitioner's Fourth Amendment right to be free from unreasonable searches does not serve as a sufficient basis for impinging upon the exercise of such constitutional guarantee. To hold, as the Court of Appeals did, that the Fourth Amendment does not prevent a search of an individual's person or property is fallacious reasoning. In fact, the Amendment does bar unreasonable searches and seizures. The juris prudence of this Court is consistent in establishing a preference for the use of search warrants. E.g. Mincey vs. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); G. N. Leasing Corp. vs. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977).

In the case at bar, the comments of the

Assistant United States Attorney with regard to the issue of the Petitioner's refusal to consent to the search of his truck were clear and unequivocal. In addition, there was no cautionary instruction given by the Court which would have served to offset the inherent prejudice of such remarks. The Fourth Amendment is an important constitutional bullock against the improper exercise of power by a law enforcement officer. To allow the invocation of such a right to be utilized against the defendant in a criminal proceeding serves to gut its efficacy.

CONCLUSION

Based upon the foregoing discussion, it is respectfully contended by the Petitioner that this Court issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the purpose of allowing review of this cause.

This the 13th day of November, 1991.

David F. Tamer
Counsel for Petitioner
1336 Westgate Center Dr.
Winston-Salem, NC 27103
(919) 760-1273

CERTIFICATE OF SERVICE

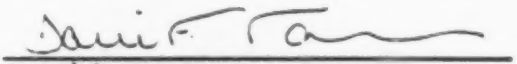
The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is an attorney for the Petitioner and is a person of such age and discretion as to be competent to serve process.

That on this the 15th day of November, 1991, he served a copy of the foregoing Writ of Certiorari by placing said copy in a first class post-paid envelope addressed as stated below, which is the last known address.

ADDRESSEE:

Ms. Christine W. Dean
Assistant US Attorney
Post Office Box 26897
Raleigh, NC 27611-6897

US Solicitor General
US Dept. of Justice
10th & Constitution
Washington, DC 20530



David F. Tamer
1336 Westgate Center Dr.
Winston-Salem, NC 27103
(919) 760-1273

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 90-5315

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROBERT MCNATT,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, District Judge. (CR-89-34)

Argued: Jan. 8, 1991 Decided: April 25, 1991

Before HALL and CHAPMAN, Circuit Judges, and COPENHAVER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Chapman wrote the opinion, in which Judge Hall and

Judge Copenhaver joined.

ARGUED: David F. Tamer, Winston-Salem, North Carolina, for Appellant. Christine Witcover Dean, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. ON BRIEF: Walter T. Johnson, Jr., BARBEE, JOHNSON, GLENN & ASSOCIATE, Greensboro, North Carolina, for Appellant. Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellee.

CHAPMAN, Circuit Judge:

Robert McNatt was convicted of possession with intent to distribute a kilogram of cocaine in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). He appeals and claims error by the district court in (1) failing to suppress the kilogram of cocaine seized from his truck on the day of his arrest; (2) denying his motion to dismiss the indictment upon his claim of ineffective assistance of counsel; (3) restricting the testimony of state prosecutor Elaine Pappas so as to prevent her

from stating her reason for changing her opinion of the reputation of Fayetteville narcotics agent Edwin Clarke for truthfulness; (4) refusing to admit into evidence a letter "probably written by Edwin Clarke", which letter admitted that Clarke had fabricated evidence in another narcotics case; (5) refusing to admit testimony going to the reason for Edwin Clarke leaving his employment with the Fayetteville Police Department; (6) denying appellant's motion in limine to prevent the government from arguing to the jury that appellant refused to consent to search his truck at the time of his arrest; and (7) using an erroneous base offense level in determining his sentence by including a quantity of drugs for which he was not indicted.

We find no merit to these exceptions, and we affirm the conviction.

I

In August 1988, North Carolina officers executed a search warrant at a farm owned by Robert McNatt. There was a fairly sizable hog raising operation at the farm, and during the search the officers found 80 grams of marijuana and several loaded firearms. The marijuana was found in a barrel close to a shed removed from the house and in the vicinity of other barns and outbuildings. A warrant for the arrest of McNatt was not issued at that time, but was issued on September 9, 1988 charging him with possession of marijuana and possession of a weapon as a convicted felon.

On September 9, 1988, government informant Davis called Special Agent Jackson of the DEA in Wilmington, North Carolina. He informed Jackson that McNatt was going to purchase a kilogram of cocaine from James

McGrady, Sr. in Fayetteville, North Carolina on that day and that the cocaine was to be delivered by Federal Express. Agent Jackson requested informant Davis to call North Carolina SBI Agent Lea in Fayetteville and give him this information. Upon receiving this information from informant Davis, Lea sent agents Edwin Clarke and David Jenkins to McGrady Enterprises, a business owned by James McGrady. He advised the agents to watch for the Federal Express truck and for a blue Chevrolet pickup truck that was owned by McNatt. Agent Lea told Agent Brabble to get the arrest warrant for McNatt signed immediately.

The agents saw a Federal Express truck near McGrady Enterprises. They stopped the truck and were advised that a delivery had been made to McGrady Enterprises. As they approached McGrady Enterprises, they saw the

blue pickup truck leaving the parking lot, and they followed it. After several blocks they stopped this pickup and found appellant McNatt was the driver. Agent Clarke asked McNatt to get out of the truck and at this point Agent Ridgen arrived. The agents asked McNatt for permission to search the vehicle, but he denied the request when he found that they did not have a search warrant. Ridgen called police headquarters to confirm that there was an outstanding arrest warrant for McNatt on the marijuana charges arising out of the search of his farm. McNatt was searched at the scene and $9,000.00 was found on his person. The truck was not searched at that time but was towed to the impoundment lot where it was searched, and a kilogram of cocaine was found on the front seat under a sweater. The defendant was arrested on state charges of possession with intent to

distribute cocaine. This charge was dismissed by the state. In August 1989, McNatt was arrested by DEA Agent Jackson on the federal charges arising out of the same facts and upon which he stood trial and was convicted.

At trial the Government called James McGrady, Sr. and James McGrady, Jr. to prove the sale of the kilogram of cocaine to McNatt on September 9, 1988 for $18,000.00. The government also called agents Jackson and Lea and police officers Clarke and Ridgen to testify as to the information received from the informant and to the circumstances of the stop and arrest of McNatt, the impoundment of his truck, and the finding of the cocaine under a sweater under the front seat of the truck.

Agent James Sparks, Assistant Supervisor of the Drug Chemistry Section of the SBI, testified that he had examined the white

powder removed from the appellant's pickup truck and that he found it to be cocaine in an undiluted form and that it weighed 1,001 grams.

Jackson also testified that after McNatt had been arrested and while he was being transported from Fayetteville to Raleigh, McNatt told him that shortly after he left McGrady Enterprises, he was stopped by Officer Clarke and that Clarke put the kilo of cocaine in his truck. He also told Jackson that marijuana found on his farm had been placed there by the police.

The defense, from the opening statement and throughout the trial, attacked Clarke, who had left the police department prior to the trial. Appellant contended that Clarke left the police department because he had manufactured evidence in prior narcotics cases and that the state had dropped certain

prosecutions, including the state charges against him, because it did not wish to rely upon Clarke's testimony.

II

Appellant made an oral motion at trial to suppress the kilogram of cocaine taken from his truck. He claimed that the inventory search of his pickup was not the result of a valid arrest and was therefore illegal, because he was stopped and arrested before an arrest warrant was issued. He also claims that the information received from the confidential informant was not reliable and would not justify a stop of his vehicle.

The trial judge conducted a voir dire hearing during the trial, and concluded that even if the warrant for McNatt's arrest had not been issued prior to the stop, there was probable cause to stop him because of the information supplied by the informant. This

information proved correct and set froth the time of the sale, the place of the sale, the delivery by Federal Express and the color of appellant's pickup. While the appellant argues that the government did not prove the reliability of the informant, the record is otherwise. The trial judge asked Agent Jackson during the voir dire: "Have you found this information provided to you on previous occasions to be reliable?" The witness answered in the affirmative. On the present facts, we agree that the officers acted on probable cause. The officer confirmed from the Federal Express driver that he had made a delivery to McGrady Enterprises, he saw a truck at McGrady Enterprises matching the description given him by the informant and he had the informant's statement that the cocaine would be sold at the time. This was probable cause under Illinois vs. Gates, 462 U.S. 213

(1983). The same probable cause would support the arrest of appellant, and the inventory search of the vehicle subsequent to appellant's arrest is valid under Colorado vs. Bertine, 479 U.S. 367 (1987).

III

Appellant claims error in the denial of his motion to dismiss the federal charges upon the ground that his Sixth Amendment right to effective assistance of counsel had been denied because the attorney, who had represented him in connection with the state charges arising out of his arrest on September 9, 1988, had also been representing James W. McGrady, Sr. and James W. McGrady, Jr. on cocaine trafficking charges pending against them in the United States District Court for the Eastern District of North Carolina. He claims this was a conflict of interest and that he was prejudiced because his then

attorney did not make an effort to resolve the state charges against him.

Appellant does not allege a conflict of interest involving his trial counsel on the federal charges. His trial counsel in the present case had not represented the McGradys. The appellant does not claim actual prejudice during the trial of his federal case, but asks us to presume prejudice because his prior counsel was sufficiently aggressive in obtaining dismissal of his state charges. He also claims that because his prior attorney actively engaged in negotiating a plea agreement on behalf of the McGradys, "such activity necessarily compromised the right of defendant McNatt to the undivided loyalty of his counsel".

The trial judge conducted a hearing on the motion and took the testimony of the prior attorney. The judge could find no conflict

nor could he find any prejudice to appellant. Neither can we. The state charges against McNatt were dismissed, and he was represented by a different attorney at his trial on the federal charges.

IV

Appellant contends that at trial he should have been allowed to ask his witness, North Carolina prosecutor Elaine Pappas, on redirect examination, the basis for her opinion that government witness Edwin Clarke was not truthful. On direct examination, appellant's attorney asked Pappas if as a result of knowing Detective Clarke for two years and working with him on certain cases, she had formed an opinion as to his character for truthfulness. The witness answered that she had an opinion and that Clarke was not truthful. On cross examination, Pappas was asked whether her current opinion regarding

Clarke had changed from the time she worked with him in a state district court. She stated at the time that she worked with him in the district court her opinion was that Clarke was truthful.

On redirect examination, the witness was asked to tell the jury what had changed her mind about Clarke's credibility. The trial judge sustained an objection to this line of testimony, and we find no abuse of discretion in this ruling. Federal Rule of Evidence 608(b)[2] on cross-examination of a witness

---

2

Rule 608. Evidence of Character and Conduct of Witness

(b) **Specific instances of conduct.** -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or

allows inquiry into specific instances of conduct of the person about whose character the witness is testifying, but the rule does not allow the party calling the witness to inquire into specific instances of conduct nor introduce extrinsic evidence of such. In addition, any use of specific instances of conduct and extrinsic evidence is committed to the discretion of the trial court by the clear language of the rule, and we find no abuse by the trial judge in the enforcement of the rule. Although the testimony of Clarke was important and the appellant had the right to attack his credibility, there are limits on how he may do this by use of opinion and reputation evidence, and specific instances of conduct. Clarke was not the only witness to

---

untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

testify about the stop and arrest of McNatt and the finding of the cocaine during the search of his pickup. Officers Lea and Ridgen testified and were subject to cross-examination, and the McGradys, Sr. and Jr., testified to the drug transaction.

V

Appellant also claims error by the trial judge in refusing to allow the introduction, through the witness Elaine Pappas, or "a letter probably written by Edwin Clarke in which he admitted that he had fabricated evidence in another narcotics case." Witness Pappas testified that she had received this document from the office of the appellant's attorney, that it states it was written by Edwin Clarke on March 3, 1989, and that Clarke had fabricated evidence in narcotics cases involving Erwin Sherlock, Vicki Gaddy, and several others. Upon further questioning,

Pappas stated that it was really not a letter but was a statement of Edwin Clarke. The statement was not witnessed, and a xerox copy of the statement was offered in evidence with no explanation of the whereabouts of the original.

The Court refused to allow the introduction of this statement even though Pappas advised the Court that she had the North Carolina SBI analyze the written statement and that the SBI had given an opinion that the document was written by Edwin Clarke.

We find no error in the Court's denial of admission of this document. The appellant attempted to prove the document by the witness Pappas. This witness had not authored the statement, it was not addressed to her, and she had been furnished the statement by the appellant's attorney. Ms. Pappas could not

authenticate the statement, and her testimony as to the author of the document was hearsay. The document did not mention McNatt or the facts of his case.

Appellant made no effort to prove the document during the cross-examination of Edwin Clarke. Clarke was asked if he had fabricated evidence in narcotics cases and if he had given a statement to some drug defendant admitting the fabrication of evidence. He denies such actions, and he was never shown a copy of the statement while he was on the stand.

It is obvious that the trial judge viewed the effort of the appellant to introduce the statement through witness Pappas as another effort to prove, by extrinsic evidence, instances of misconduct by Clarke to attack his credibility. Pappas was appellant's witness. The statement was inadmissible

because it was hearsay and also inadmissible because it did not comply with Federal Rule of Evidence 608(b).

Appellant argues that the document was admissible to show the bias of Clarke toward appellant. This argument is also unavailing. The document makes no mention of McNatt and it contains nothing to show that there was a relationship between Clarke and McNatt. "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States vs. Abel, 469 U.S. 45, 52 (1984).

McNatt also claims that he was prevented by the trial judge from showing through the witness Pappas that Clarke had "[a] relationship with an informer who was

allegedly being used in his drug investigations." Appellant claimed that his line of testimony was to prove why Clarke left his position with the Fayetteville Police Department. The alleged informant with whom Clarke may have had a relationship was not involved in the McNatt case, and there was no showing that this line of questioning would have shown a bias of Clarke against McNatt. Again it was an effort to attack Clarke's credibility by extrinsic evidence in violation of Federal Rule of Evidence 608(b), and the court properly excluded it.

The government witness Clarke was vigorously cross-examined, and his credibility was attacked throughout the presentation of defendant's case. The trial judge exercised proper control of the case so as to prevent the Clarke issue from becoming "[a] trial within a trial."

VI

Prior to jury arguments, defendant made a motion in limine seeking to prevent the prosecution from arguing t the jury that he had refused to allow the officers to search is pickup at the time he was stopped and arrested on September 9, 1988. Appellant claims that he has a Fourth Amendment right to refuse permission to search without a warrant, and the exercise of this right should not be used against him.

The trial judge denied this motion and observed:

> Well, then don't you think it's a little one-sided for you to be able to argue that the drugs were planted there, when they would have had to have been planted by the officer, whose credibility you're attacking, and yet, not allow the government to argue that the defendant told that very officer and another officer that they could not search the vehicle.

The judge found that the prosecution could

argue the refusal to allow the search because defendant had claimed from the beginning that the drugs were planted in his truck by Clarke, and he intended to pursue this claim in his argument to the jury.

Appellant claims that it is a violation of his due process rights for the government to argue that the assertion of a constitutional guarantee supports an inference of guilt. He relies upon Doyle vs. Ohio, 426 U.S. 610 (1976), and Griffin vs. California, 380 U.S. 609 (1965), but these decisions do not support appellant's theory. Doyle and Griffin protect a criminal defendant from having his silence used against him and the use of silence as evidence of guilt. These cases involve fifth amendment rights which guarantee that one may not be forced to be a witness against himself in a criminal case, whether verbally or by his silence. The

present case involves the fourth amendment right to be free from unreasonable searches, and the refusal to consent to a search could be upon privacy grounds, rather than fear of incrimination.

The comments of the agents that McNatt had refused permission to search his pickup was a fair response to McNatt's argument that Clarke had planted the kilo of cocaine in his truck. Appellant was on notice that this could happen, because the trial judge in denying his motion in limine stated that it would be one-sided or unfair to allow McNatt to argue that the drugs had been planted in the truck after he had been arrested but prevent the prosecutor from commenting on the fact that he had refused permission to search the truck at the time of his arrest.

This is not analogous to the facts in Doyle, where the defendant had been given the

warnings required by Miranda, which included the assurance that his silence could not be used against him and them impeaching his testimony at trial by means of his post-arrest silence. Under the fifth amendment, a suspect has the right to remain silent at all times and may not be required to say anything at the time of his arrest, during confinement or at trial. However, under the fourth amendment, a person may not prevent a search of his person or his property. By withholding permission to search, he merely puts the government to the procedural test of proving probable cause to obtain a search warrant.

The prosecutor did not mention appellant's failure to give permission to search in her opening argument to the jury. The brief comments on this subject came in the government's reply argument and were in response to appellant's attack upon Clarke and

the assertion that Clarke planted the cocaine in appellant's truck. The government did not argue that appellant's refusal supported an inference of guilt, but only that it was inconsistent with the claim that the evidence had been planted.

A charge that one has been "framed" by a policeman's planting of a kilogram of cocaine in his truck and then arresting him and charging him with possession of cocaine with intent to distribute is not to be lightly made. Nor is it to be taken lightly by the right and the responsibility to respond to such a charge when there is little to support it. On the present record, there was very little to support appellant's claim that Officer Clarke had planted the cocaine in his truck. The evidence reflects that the kilogram of cocaine was as large as a rick and would not be easily concealed on Clarke's

person. Officer Ridgen arrived immediately after Clarke had stopped McNatt. The stop and arrest were based upon accurate information received from a reliable informant. The McGrady's testified that the kilogram was delivered to McNatt moments before he was stopped.

It appears clear from the record that appellant's trial strategy was to put Officer Clarke on trial. Such a strategy is often used and sometimes successful. However, appellant sought the added advantage of preventing any comment on the weakness of his argument -- his refusal to consent to a search of his truck at the time of the stop. The Assistant United States Attorney made no comment until her rebuttal argument, and only after defense counsel had claimed that Clarke had planted the evidence did she respond in three short sentences, which we find were a

fair response to a very serious charge of police misconduct.

Certainly, a search at the time of the stop would have revealed whether the cocaine was in the truck. If the search had produced nothing, McNatt would have have been detained nor indicted. If the cocaine had been found, then appellant would have difficulty in arguing that Clarke framed him. Appellant seeks to make a serious charge of police misconduct, and at the same time prevent the police from pointing out the weakness of the charge.

Appellant relies on United States vs. Taxe, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977), in which the court held that it was error for the prosecutor to comment to the jury that Taxe had refused police permission to search his truck at the time he was stopped. However,

this opinion does not indicate whether these remarks were made by the prosecutor in his opening argument to the jury, or whether they were made as a fair response to some claim presented by the defendant in his jury argument. In United States vs. Thame, 846 F.2d 200 (3d Cir.), cert. denied, 488 U.S. 928 (1988), also involving comments by a prosecutor on a denial of a permission to search, the court stated that the argument could not be justified as invited reply since the prosecutor raised the argument first, and it cited United States vs. Robinson, 45 U.S. 25 (1988). In Robinson, the defense attorney, in his closing argument, stated several times that the government had not allowed the defendant, who did not testify, to explain his side of the story and had unfairly denied him the opportunity to explain his actions. The prosecutor sought permission to comment upon

the defendant's failure to testify, because the defense had opened the door in its jury argument. The Court held that this was not a case in which the prosecutor on his initiative had asked the jury to draw an adverse inference from the defendant's silence or to treat the defendant's silence as substantive evidence of guilty, but was simply a fair response to a claim made by the defendant or his counsel. The Court stated that there may be some cost to a defendant in remaining silent in every situation but the Court declined to preclude a fair response by the prosecutor in situations such as that presented.

This reasoning applies to our facts. Appellant was well aware that if he claimed the cocaine had been planted in his truck by Officer Clarke, the prosector would be allowed to comment on his refusal to allow a search at

the time most important to this issue. The appellant proceeded with his argument and the prosecutor made a short response that was invited and such was not an unfair penalty for defendant's asserting a constitutional privilege.

Even if it was error, it was harmless error. In United States vs. Hasting, 461 U.S. 499 (1983), the Court explained our duty when considering error in the record.

> The question a reviewing court must ask is this: absent the prosecutor's allusion to failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty? A reviewing court must begin with the reality that the jurors sat in the same room day after day with the defendants and their lawyers; much testimony had been heard from the three women who described in detail the repeated wanton acts of the defendants during three hours in two states, thus negating any doubt as to identification.

Id. at 510-11 (citation omitted).

In the present case, there was substantial evidence from the McGradys as to their drug dealings with McNatt, the information supplied by the informant was correct in all particulars, other law enforcement officers testified and their testimony reenforced that of Clarke, and the kilogram of cocaine was found in appellant's truck shortly after he left the McGradys. We can say that it is clear beyond a reasonable doubt on the present record that the jury would have returned a verdict of guilty without the short statement by the Assistant United States Attorney that appellant had denied permission to search the pickup at the time of the stop.

VII

Appellant claims error by the district court in including amounts of cocaine for which he was not convicted in calculating his

base offense level. The court found that the defendant was involved in two and a half kilograms of cocaine. The court stated that this finding was based upon the credibility of the witness James McGrady, Sr. at trial. This witness testified that McNatt had sold him one-half kilogram of cocaine between July and August 1988 and that between August 12 and September 9, 1988, McGrady had sold two kilograms to McNatt. This included the kilogram that was found in McNatt's truck and resulted in his prosecution. All of these transactions occurred within a three month period and involved the same people and the "same course of conduct" under 1B1.3(a)(2). The sentencing court may consider quantities of cocaine not specified in the indictment, when they result from the same course of conduct or a common scheme or a plan, as the offense of conviction. United States vs.

Williams, 880 F.2d 804 (4th Cir. 1989). The findings of fact by the district judge are supported by the record, and we find no error in the sentence.

For the foregoing reasons, the conviction of the appellant is

AFFIRMED.